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HASHIM ABDULLAH v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
B [CRIMINAL APPEAL NO: J-05-90-2013]
5 FEBRUARY 2016

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Drugs found in plastic bag carried by accused – Accused arrested with two others – Accused sentenced to death – Whether plastic bag carried by accused's friend – Whether defence probable or mere denial – Whether prosecution's case proved beyond reasonable doubt – Whether conviction and sentence safe*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Drugs found in plastic bag carried by accused – Accused arrested with two others – Accused sentenced to death – Whether plastic bag carried by accused's friend – Whether defence probable or mere denial – Whether prosecution's case proved beyond reasonable doubt – Whether conviction and sentence safe – Dangerous Drugs Act 1952, s. 39B(2)*

E ***EVIDENCE:*** *Adverse inference – Failure of prosecution to call witness – Prosecutorial discretion of calling witnesses to testify – Drugs found in plastic bag carried by accused – Accused arrested with two others – Non-calling of two others arrested with accused to testify during trial – Whether failure to secure attendance of material witnesses resulted in inability to present complete and effective defence – Whether adverse inference ought to be invoked against prosecution – Evidence Act 1950, s. 114(g)*

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Acting upon information that a certain drug trafficking activity would take place at a bus terminal, a team of police officers led by PW4 took positions and monitored the said area. Three men were later seen in the vicinity and one of them was holding a plastic bag. When PW4 approached them and introduced himself as a police officer, the three men bolted and fled into three different directions but PW4 and PW5 successfully apprehended them. The three men were later identified as the appellant, Aung Aung and Abdullah. The plastic bag which the appellant was carrying was examined and two tissue boxes, each containing a packet wrapped in newspaper, were found. Inside the packets, PW4 found translucent plastic packets containing substances which were later confirmed by the chemist to be 46.64g of heroin. The appellant was subsequently charged in the High Court for trafficking in dangerous drugs, an offence under s. 39B(2) of the Dangerous Drugs Act 1952. The prosecution's case grounded entirely upon the testimonies of PW4 and PW5. Satisfied that a *prima facie* case had been established by the prosecution, the appellant was called to enter his defence. *Vide* his defence,

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the appellant denied holding a plastic bag at the time of his arrest and averred that it was Aung Aung who brought the plastic bag but the appellant did not know its contents. At the conclusion of the trial, the appellant was found guilty, convicted for the offence and sentenced to death. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the trial judge failed to invoke s. 114(g) of the Evidence Act 1950 ('the Act') against the prosecution for failing to call Aung Aung and Abdullah to testify; (ii) whether the investigation officer's ('PW6') failure to secure the attendance of Aung Aung and Abdullah resulted in the appellant's inability to present a complete and effective defence; (iii) whether the prosecution's failure to tender the statements of Aung Aung and Abdullah under s. 112 of the Criminal Procedure Code ('CPC') ('the s. 112 statements') had caused a failure of justice; and (iv) whether the trial judge had imposed an unusually higher burden on the appellant to raise a reasonable doubt by expecting the appellant to call Aung Aung and Abdullah.

Held (dismissing appeal; affirming conviction and sentence)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The calling of witnesses to the stand is entirely a prosecutorial discretion. Where the witnesses not produced are not material or where evidence given is largely redundant, no presumption under s. 114(g) of the Act operates against the prosecution. Since PW4 and PW5 were able to give evidence of the transaction of the drug-trafficking by the appellant, there was absolutely no reason why Aung Aung and Abdullah should be called. The appellant was not arrested together with the two witnesses. When the appellant was apprehended and the plastic bag was searched, both Aung Aung and Abdullah were 50-60m away from him. Hence, they were not material to the prosecution to unfold its full narrative. The defence version that it was Aung Aung who held the plastic bag had no leg to stand on, with or without Aung Aung or Abdullah's evidence. (paras 12, 15, 16 & 18)

(2) The prosecution was not in the position to bring Aung Aung and Abdullah to court notwithstanding PW6's commitment that she would assist the defence to procure their attendance. The non-production of these two witnesses demanded by the appellant was not deliberate or unfairly kept back. They were not produced because (i) the prosecution's case was never grounded upon their testimonies; (ii) they were considered insignificant at the material time; and (iii) their materiality was never part of the prosecution's game plan. (para 29)

(3) The prosecution was under no compulsion to produce the s. 112 statements on account that Aung Aung and Abdullah were, in so far as the prosecution was concerned, not material witnesses and the prosecution had no intention to call them to testify. Indeed, they were not called at all. Hence, the prosecution was under no duty to produce the statements. Furthermore, the appellant did not request the

A prosecution or PW6 to produce the statements and did not apply to the trial judge to compel the prosecution to produce the same. It was too late in the day to hearken upon the non-production of the statements. In any event, PW6 said that the statements of Aung Aung and Abdullah were taken under s. 113 of the CPC, not s. 112. (para 32)

B **(4)** There was nothing in the trial judge's judgment to show that His Lordship had imposed a higher burden by insisting that the appellant call Aung Aung and Abdullah to the stand. The trial judge was merely expressing the obvious that the appellant's defence was plainly premised upon mere denial that he was holding the plastic bag without more.
C (para 35)

Case(s) referred to:
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Chua Keen Long v. PP [1996] 1 SLR 510 ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
D *Khoon Chye Hin v. PP [1961] 1 LNS 41 HC* ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113
E Dangerous Drugs Act 1952, s. 12(2)
Evidence Act 1950, ss. 32(1), 114(g)

For the appellant - Subash Ramasamy; M/s Chand, Jag & Assocs
For the respondent - Munahlyza Mustapha; DPP

F *[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: MTJ(1)-45A-10-2012 (affirmed).]*

Reported by Najib Tamby

JUDGMENT

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Ahmadi Asnawi JCA:

[1] The appellant was preferred with the following charge before the High Court at Johor Bahru:

> Bahawa kamu pada 5 Februari 2012, jam lebih kurang 2.10 pagi, bertempat
H di Jalan Jaya, Taman Jaya, Batu 10, Skudai, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah mengedar dadah jenis heroin, berat bersih 46.64 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya, 1952, dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

I **[2]** At the conclusion of the trial, the appellant was found guilty and convicted of the offence and sentenced to suffer the death penalty.

[3] Dissatisfied with both conviction and sentence, the appellant lodged an appeal to this court. After examining the entire appeal record and considering the written and oral submissions of the parties, we found the appeal was bereft of merit and dismissed the same. We affirmed the conviction and sentence handed down by the High Court. We now give our grounds.

The Case For The Prosecution

[4] The prosecution presents the following narration of facts:

(i) on 5 December 2012, acting upon information received relating to a drug trafficking activity, PW4 (ASP Sobri bin Baki of the Narcotics Division, IPK, Johor) together with his team consisting of 17 officers headed for the bus terminal at Jalan Jaya, Taman Jaya, Skudai, Johor. The terminal was the transit point where buses plying the Kuala Lumpur - Johor Bahru route would offload their passengers. They left for the said terminal at about 1.30am;

(ii) the team was divided into three (3) smaller teams. PW4 headed one of the teams, comprising of D/Sjn Jeyarajan a/l Phillip Sundram, D/L/Kpl Rosli bin Daud and Konst Rhyman bin Matar. The two (2) other teams were respectively led by ASP Mohd Isa bin Bidin and Insp Ganeson;

(iii) the teams arrived at the bus terminal at about 1.50am and took their respective positions as directed by PW4. Within the vicinity of the bus terminal was a taxi station and an extended parking area for the general public;

(iv) PW4 and his men monitored the situation from the taxi station. About 10 to 15 minutes later, PW4 saw a group of three men walking on foot from the bus terminal towards the parking area. They were conversing among themselves. He was then about 50m away from the three men but nevertheless was able to see them clearly as the location was well lighted. Amongst the three, PW4 spotted a man wearing a white t-shirt with black stripes and was carrying a plastic bag. PW4 later identified the said man as the appellant. The two other men were wearing jackets;

(v) PW4 and members of his team followed the three men. A short distance later, he approached them. He showed his authority card and identified himself as a police officer;

(vi) in response, the three men immediately bolted. PW4 together with PW5 (D/Sjn. Jayaraman a/l Phillip Sundram) and members of his team went after the appellant and managed to apprehend the appellant about 10 to 20m away after a brief struggle. The appellant was still holding the said plastic bag in his right hand;

(vii) the two other men were arrested by the teams headed by ASP Mohd Isa bin Bidin and Insp Ganeson, after a chase. They were later identified as Abdullah bin Hussin (arrested by Insp Ganeson's team) and Aung Aung (arrested by ASP Mohd Isa bin Bidin's team);

(viii) the appellant was then taken to a street light in the parking area;

(ix) next, PW4 proceeded to examine the plastic bag carried by the appellant in the presence of the appellant. The two other men arrested by ASP Mohd Isa bin Bidin and Insp Ganesan were still about 50 to 60m away from them. The plastic bag had the letters VISS printed on it (exh. P12, marked 'S' by PW4). PW4 found two (2) tissue boxes (exh. P13A, marked 'S1' by PW4 and exh. P13B, marked 'S2' by PW4) which were exceptionally heavy inside the plastic bag. Inside the tissue box exh. P13A, PW4 found a packet wrapped in Chinese newspaper sheet (exh. P8A, marked 'S1A' by PW4). PW4 then unwrapped the same and found it to contain a translucent plastic packet (exh. P8B, marked 'S1B' by PW4) containing substance suspected to be heroin (exh. P8C, in a plastic packet issued by Jabatan Kimia Malaysia containing the balance of the substance marked 'C1' by the chemist, PW3, Siti Zubaidah bt Hanapi);

(x) PW4 found similar items and substance wrapped in similar manner in the second tissue box exh. P13B. The Chinese newspaper wrapping is exh. P9A (marked 'S2A' by PW4), the translucent plastic packet containing substance suspected to be heroin is exh. P9B (marked 'S2B' by PW4) and the plastic packet issued by Jabatan Kimia Malaysia containing the balance of the substance is exh. P9C (marked 'C2' by PW3);

(xi) meanwhile, Insp Ganesan found two pieces of eramin five pills from the small front pocket of the trousers worn by Abdullah bin Hussin. ASP Mohd Isa bin Bidin also recovered two pieces of eramin five pills from the front left pocket of the trousers worn by Aung Aung;

(xii) the appellant, Abdullah bin Hussin and Aung Aung were consequently arrested and the incriminating exhibits were seized. An arrest report was lodged by PW4 *vide* Skudai Report No. 576-578/12 (exh. P18). The appellant together with the said exhibits, borang bongkar (exh. P17) and the police report were then handed over to the investigating officer, PW6 (Insp Amirah Ainaa bt Mohd Jan) *vide* borang serah menyerah (exh. P19). The two other suspects (Abdullah bin Hussin and Aung Aung) were also handed to the IO; and

(xiii) the two packets containing substance suspected to be heroin were sent to the chemist, PW3. She found the same to be heroin with a combined weight of 46.64g (hereinafter referred to as 'the drugs'). PW3 also testified that heroin is listed in the First Schedule of the Dangerous

Drugs Act 1952 (hereinafter referred to as 'the DDA 1952'). PW3 also prepared a report of his analysis, exh. P16, evinced at p. 194 of the rekod rayuan (RR).

Findings Of The Learned Trial Judge At The End Of The Prosecution's Case

[5] The learned judge at pp. 7 and 8 of rekod rayuan tambahan II (RRT-II) found:

> Dalam kes ini, adalah jelas dari keterangan SP-4 dan SP-5, OKT mempunyai kawalan dan jagaan ke atas barang kes yang dirampas itu. OKT dilihat sedang memegang beg plastik bertulisan 'VISS' tersebut yang kemudiannya dijumpai di dalamnya dadah heroin tersebut. Ini jelas menunjukkan bahawa milikan fizikal ke atas barang kes tersebut adalah tidak boleh disangkal.
>
> OKT juga jelas mempunyai pengetahuan tentang dadah yang dijumpai itu. Adalah sesuatu yang mustahil untuk seseorang yang memegang sesuatu barang itu tidak mengetahui tentang barang yang dipegangnya. Ditambah lagi dengan keterangan reaksi OKT yang melarikan diri setelah SP-4 memperkenalkan diri sebagai polis jelas menunjukkan pengetahuan OKT tentang kandungan di dalam beg plastik tersebut.
>
> Manakala dari segi anggapan di bawah seksyen 37(da), Akta Dadah Berbahaya, setelah dibuktikan elemen milikan itu, berat heroin yang dirampas melebihi 15 gram adalah tergolong di bawah seksyen ini.
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> Melalui penelitian secara maksimum terhadap kesemua keterangan saksi-saksi pendakwaan seperti yang dinyatakan di atas, jelaslah bahawa kesemua elemen kesalahan seperti yang dipertuduhkan terhadap OKT, telah berjaya dibuktikan oleh Timbalan Pendakwa raya secara '*prima facie*'-nya.

[6] We were in full agreement with the aforesaid findings of the learned judge.

The Appellant's Defence

[7] The appellant gave evidence on oath and posited that:

(i) he was working at Pasar Borong Selayang together with Aung Aung and had known him for three years prior to his present arrest. He knew Abdullah bin Hussin through Aung Aung;

(ii) on 4 February 2012, a day before the incident leading to his arrest on 5 February 2012, Aung Aung had requested his company and Abdullah bin Hussin to go to Johor Bahru to meet his (Aung Aung's) friend. Aung Aung gave him RM200 to buy three bus tickets to Johor Bahru. Since it was the Chinese New Year holiday season, the appellant went along with Aung Aung's plan to go to Johor Bahru;

(iii) the appellant then proceeded to Stesen Bas Tasik Selatan and at about 8pm, purchased three bus tickets to go to Johor Bahru, departing at 10pm. He brought along a sling bag containing his personal items. Soon after Aung Aung and Abdullah Hussin arrived at the station, Aung Aung brought a plastic bag with him. Though they had conversed, nevertheless, the appellant did not ask Aung Aung the contents of the said plastic bag;

(iv) the bus arrived at the bus terminal, Skudai (Johor Bahru) on 5 February 2012 at about 2.05am. They got down from the bus near the overhead bridge. Aung Aung and Abdullah Hussin went to a mamak restaurant whereas the appellant was asked to wait at the taxi station. He left the taxi station when many taxi drivers started to ask him where he wanted to go and stood by the roadside indicated in the photograph exh. P5(5) at p. 111 of rekod rayuan (RR) and p. 189, rekod rayuan tambahan (RRT);

(v) soon after the appellant saw Aung Aung and Abdullah bin Hussin leaving the restaurant and crossed the road in front of him. They went towards a Proton Saga motorcar, parked by the side of the road and started having conversation near the car. Suddenly, the appellant saw a taxi coming very fast and stopped abruptly close to the Proton Saga motorcar. Four men alighted from the taxi. Aung Aung and Abdullah Hussin fled the scene in two different directions. Two of the four men who had alighted from the said taxi then pursued both of them. The appellant thought it was a robbery or that a fight had occurred but did not assist both Aung Aung and Abdullah bin Hussin since they have fled;

(vi) the appellant next decided to go to the mamak restaurant. As he was about to leave, a motorvan stopped behind him. There were four men. He was then detained by three of them with one of them pointing a pistol at him and ordering him to squat. He was kicked, slapped and pushed down. He was physically searched and finally handcuffed; and

(vii) the appellant contended that at the time of his arrest/detention, he had only his sling bag with him. He denied having and holding the plastic bag marked 'S' (exh. P12) at the time of his arrest. The appellant further denied that he took flight from the scene because he knew that there were drugs inside the said plastic bag. Nevertheless, the appellant added that he saw the police examining the said plastic bag in front of Aung Aung but did not know the contents of the said plastic bag. The appellant also averred that he would not have come to Johor Bahru with Aung Aung had he known that Aung Aung would come with drugs.

Findings Of The Learned Judge At The End Of The Defence Case

[8] The learned judge found that the appellant had failed to raise a reasonable doubt in the prosecution's case and that the prosecution had indeed proven its case beyond a reasonable doubt. As stated earlier, the appellant was found guilty, convicted of the offence proffered against him and was sentenced to suffer the death penalty.

The Appeal Before Us

[9] Learned counsel submitted four broad grounds of appeal, namely:

(i) that the learned judge had failed to invoke s. 114 illustration (g) of the Evidence Act 1950, against the prosecution for the failure to call Aung Aung and Abdullah bin Hussin to testify;

(ii) that the learned judge had failed to consider that the IO's (PW6) failure to secure the attendance of Aung Aung and Abdullah bin Hussin had resulted in the appellant's inability to present a complete and effective defence;

(iii) that the learned judge had failed to appreciate that the failure of the prosecution to tender the s. 112 statements of Aung Aung and Abdullah bin Hussin had caused a failure of justice; and

(iv) that the learned judge had failed to judicially appreciate the defence thereby imposing an unusually higher burden on the appellant to raise a reasonable doubt.

Our Decision

[10] Learned counsel submitted that the testimonies of PW4 and PW5 indicate that the accused was arrested at the scene together with Aung Aung and Abdullah bin Hussin. The prosecution's version was that the accused was the person who was holding the bag that contained the impugned drugs. However, the defence version was that it was Aung Aung who was holding the plastic bag and the accused did not at all times hold the said plastic bag.

[11] It was submitted that in the light of the '*Alcontara* notice' that was given by the defence, the prosecution ought to have called Aung Aung and Abdullah bin Hussin to rebut the defence version and the appellant would have confronted them during cross-examination. That was not done. Hence, it was implored before us that the learned judge should have invoked the adverse inference rule under s. 114 illustration (g) of the Evidence Act 1950, against the prosecution for their failure to call the two important witnesses.

[12] Now, in a criminal case, the business of calling witnesses to the stand is entirely a prosecutorial discretion subject only to the rider that there should not be an oblique motive and suppression of evidence (*Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] MLJ 105); that the full narrative/onus of proof is fully discharge (*Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 6); and the materiality/essentiality of the witnesses to the prosecution's case. Where the witnesses not produced are not material or where the evidence to be given is largely redundant, no presumption under s. 114 illustration (g) operates against the prosecution. In determining whether or not that presumption ought to be drawn the court will have regard to all the circumstances, but particularly and importantly,

A the materiality of the witnesses not produced (*Chua Keen Long v. PP* [1996] I SLR 510). In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 of p. 494 the Supreme Court (Mohamed Azmi SCJ) stated:

> It is essential to appreciate the scope of section 114(g) lest it be carried too for outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not only on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[13] We have scrutinised the facts and evidence before us and opined that the appellant was not arrested together with Aung Aung and Abdullah bin Hussin as contended by learned counsel. Both PW4 and PW5 initially saw all the three of them walking together. Equally both PW4 and PW5 saw the appellant distinctly carrying the said plastic bag from the moment they spotted the three of them walking together. However, when they were accosted by PW4 and his officers, all the three fled in three different directions.

[14] PW4 and his men went after the appellant and after a short chase, managed to subdue and arrest the appellant and seized the plastic bag still held by the appellant. Aung Aung and Abdullah bin Hussin were arrested by other teams under PW4's direction at different locations. When the appellant was brought to the parking area under a street light where he was physically searched and the plastic bag held by him was examined resulting in the discovery of the said drugs, both Aung Aung and Abdullah bin Hussin were still about 50 to 60m away from them with the respective arresting officers.

[15] In such event, by any stretch of the imagination could it be said that the appellant was arrested together with Aung Aung and Abdullah bin Hussin and hence their non-materiality to the prosecution to unfold its full narrative. As was with the learned judge who had accepted the testimonies of PW4 and PW5, which necessarily means that the learned judge found the two witnesses to be credible witnesses, which realm is solely within his primary domain, we too have no reason to disbelieve their testimonies particularly in relation to the events leading to the arrest and seizure of the said drugs from the appellant.

[16] It is apparent that the prosecution's case was grounded entirely upon the testimonies of PW4 and PW5. They are perfectly entitled to do so on account that it is solely their business how to go about proving their case. The number of witnesses needed to prove their case or a particular fact is equally irrelevant. In law, all they need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. It appeared thus that insofar as the prosecution is concerned, Aung Aung and Abdullah bin Hussin are neither material nor essential for the

prosecution to unfold its narrative and establish its case. The court is not in the business of questioning the number of witnesses nor their preference of which witnesses to be called. As long as PW4 and PW5 are able to give evidence of the transaction, *to wit*, the trafficking of the said drugs by the appellant, which we found that the prosecution had successfully established so, there is absolutely no reason why Aung Aung and Abdullah bin Hussin should be called nor why any presumption should be invoked that their evidence, if produced, would have been against the prosecution.

[17] Additionally, we were satisfied that there has not been any suppression of evidence nor oblique motive on the part of prosecution in not calling Aung Aung and Abdullah bin Hussin in terms as expressed by the Supreme Court in *Munusamy Vengadasalam v. PP* (*supra*). Equally, we found that the onus of proof has been fully discharged. On all fours, the prosecution's job is done. Hence, the failure to call Aung Aung and Abdullah bin Hussin is no ground to warrant the invocation of the inference under s. 114 illustration (g) of the Evidence Act 1950, to operate adversely against the prosecution.

[18] The defence version that it was Aung Aung who was holding the plastic bag and that the accused did not at all times hold the said plastic bag indeed has no leg to stand on, with or without Aung Aung and Abdullah bin Hussin's evidence. Firstly, it is a ludicrous endeavour to expect Aung Aung to come to the stand and loudly declare that the plastic bag containing the said drugs was held by him at all times including at the point of his arrest. Common sense would dictate that no amount of cross-examination would change his stand.

[19] Secondly, both PW4 and PW5 saw the appellant holding the plastic bag from the moment they saw the appellant walking with the two others until his arrest after a short chase. The plastic bag was still held by the appellant at the point of his arrest. The testimonies of these two witnesses were unshaken although they were exposed to the maximum brunt of cross-examination. Both expressed their disagreement with the suggestion put by learned counsel that after the arrest of Aung Aung with the plastic bag held by him, the said plastic bag was taken and shown to the appellant whereby the appellant indicated his want of knowledge of the contents of the said plastic bag. Now, this begs the question the need for both of them to unnecessarily implicate the appellant with the drugs. They have no axe to grind against the appellant. Both were also total strangers to the appellant and the appellant, bearing the burden of prove of motive, has not shown that both PW4 and PW5 had harboured an ulterior motive to fix the appellant.

[20] In respect of the same, the learned judge articulated the issue in the following terms (at pp. 12, 13 of RRT-11):

> Menurutnya pada waktu kejadian dia baru sahaja tiba dari Kuala Lumpur bersama-sama dua orang lagi rakannya iaitu Aung Aung dan Abdullah bin Hussin. Menurut OKT, beg plastik yang mengandungi dadah tersebut (P12) tidak dipegang oleh beliau dan beliau tidak pernah memegang beg

A tersebut pun. Menurut OKT, beliau nampak beg plastik tersebut dibawa oleh Aung Aung sejak dari Kuala Lumpur lagi. *Namun, melalui keterangan saksi juga, Aung Aung turut ditahan pada malam tersebut bersama-sama OKT dan seorang lagi bernama Abdullah bin Hussin. Persoalannya di sini, jika benar Aung Aung yang memegang beg plastik tersebut, mengapa perlu pihak polis menukar cerita dan menyatakan bahawa OKT yang telah memegang beg plastik tersebut?*

B *Bukankah lebih mudah untuk pihak polis menyatakan terus bahawa beg plastik yang mengandungi dadah itu dipegang oleh Aung Aung dan terus menuduh Aung Aung sahaja. Sukar untuk menerima yang pihak polis menukar cerita semata-mata hanya untuk menganiaya OKT sekiranya benar beg plastik tersebut dipegang oleh Aung Aung.*

C (emphasis added).

Selain itu, jika dilihat pada P17 (Borang Bongkar), ketiga-tiga tangkapan pada malam itu telah menurunkan tandatangan dan tertulis pada Borang Bongkar tersebut bahawa beg plastik tersebut dipegang oleh OKT sendiri.

D Benar seperti dihujahkan oleh pihak pendakwaan bahawa keterangan dari saksi-saksi polis wajar diterima selagi keterangan tersebut dilihat sebagai munasabah. Ini memandangkan saksi-saksi polis tersebut tidak mempunyai apa-apa kepentingan; jauh sekali untuk mereka-reka cerita akan kejadian berlaku.

E … Kedua-dua pihak, baik di pihak polis mahupun OKT dan rakan-rakannya, mereka tidak pernah berjumpa dan tidak mengenali di antara satu sama lain. Jadi tidak timbul soal OKT dianiaya dan sebagainya. Apa yang jelas keterangan pembelaan ini lebih merupakan penafian semata. Pembelaan sebegini tanpa disokong oleh bukti konkrit, bukan pembelaan yang baik.

F **[21]** We were entirely with the learned judge in respect of his analysis of the evidence and determination of the issue at hand.

[22] Thirdly, the appellant contended that he had never tried to run from the scene. On the other hand, both PW4 and PW5 testified in no uncertain terms that the appellant took flight immediately upon PW4 identifying himself as a police officer and showing his authority card to the appellant and his two other companions. The learned judge rejected the appellant's evidence that he had never tried to run (see p. 14 of RRT-II). It is a factual issue entirely within his domain and the learned judge is entitled to do so. It again begs the question the need for the appellant to run from the scene when he had no incriminating materials with him as the said plastic bag containing the drugs was alleged to have been held by Aung Aung and Aung Aung had fled the scene. The learned judge is correct when he found that the appellant's conduct showed that he had *mens rea* possession of the said drugs.

[23] Learned counsel submitted that during the cross-examination of PW6, she had agreed to bring Aung Aung and Abdullah bin Hussin to court if his defence is called. However, she was unable to bring the two witnesses to the court when the appellant's defence was called. Learned counsel added that

her evidence shows that she did not take serious effort to locate these witnesses and this had resulted in the appellant's inability to present a complete and effective defence.

[24] PW6 (the IO) had testified under cross-examination that Aung Aung and Abdullah bin Hussin were individually charged and both had pleaded guilty of an offence under s. 12(2) of the DDA 1952. Aung Aung was fined in the sum of RM3,500 and Abdullah bin Hussin was jailed for six months. She was not told that they will become witnesses in this trial and did not attempt to secure their attendance on security bonds as there was no such instruction from the Deputy Public Prosecutor ('DPP'). Nevertheless, she agreed to assist the defence to bring these two gentlemen to court in the event that the appellant is ordered to enter his defence.

[25] When PW6 was recalled by the defence after the appellant had testified, she said that she could not bring the two witnesses to the court as she could no longer trace nor locate their whereabouts. She had their last known addresses at Pasar Borong Selayang without further details.

[26] In re-examination by the learned DPP, PW6 said that on 5 February 2012 she had contacted and instructed one L/Kpl 153890 Mohd Zulkarnain from Balai Polis Jinjang to go to Pasar Borong Selayang to locate the two witnesses. She added that L/Kpl Mohd Zulkarnain had gone to Pasar Borong Selayang and found thousands of Myanmar nationals there. He failed to locate the two witnesses though without details of their addresses.

[27] On 7 February 2013, she had contacted the Immigration Department at Setia Tropika to enquire about Abdullah bin Hussin and was informed, from their records, that Abdullah bin Hussin was transferred to Depoh Tahanan Imigresen at Pekan Nanas to be deported. Then, she contacted Depoh Tahanan Immigresen Pekan Nanas and was notified that Abdullah bin Hussin has been discharged by UNHCR and his present whereabouts is not known.

[28] PW6 further stated that Aung Aung was sentenced on 16 May 2012. He paid the fine of RM3500 and was released unconditionally. His whereabouts thereafter is unknown. However, she had received a telephone call from Aung Aung's wife that she (Aung Aung's wife) had come to Malaysia to bring back Aung Aung to Myanmar. Nevertheless, she did not check with the Immigration Department whether Aung Aung had in fact left Malaysia. She believed Aung Aung's wife that she has taken Aung Aung back to Myanmar.

[29] From the narratives given above, we opined that, given the circumstances, the prosecution was not in position to bring the two witnesses to the court notwithstanding PW6's commitment that she will assist the defence to procure their attendance. The non-production of these two witnesses demanded by the appellant was not deliberate or unfairly kept back. They

were not produced because the prosecution's case was never grounded upon their testimonies. Equally, they were not produced because the two of them were considered insignificant at the material time and their materiality were never part of the prosecution's game plan. It explained why the two of them were left alone or let off by the prosecution without security bonds after their respective convictions and sentences were served. At the time when these two witnesses were demanded by the prosecution, they were outside the control of the prosecution. Though efforts were made to locate them it were unsuccessful. In our judgment, the non-production of these two witnesses by the prosecution is on account of the failure to locate and subpoena them. It is not as a result of withholding or suppression of evidence and cannot be categorised as such. Such failure is no justification to resolve the issue in favour of the appellant.

[30] Learned counsel also submitted that based on the version offered by the defence, the prosecution should have at least tendered the statements of Aung Aung and Abdullah bin Hussin recorded under s. 112 of the Criminal Procedure Code (CPC) to resolve the doubt that have arisen in the case. This was not done and no explanation was advanced by the prosecution as to why this was not done. The learned judge should have resolved this failure in favour of the appellant.

[31] We find no merit in this complaint. It is our judgment that the prosecution is under no compulsion to produce the s. 112 statements of these two witnesses on account that these two witnesses were, insofar as the prosecution is concerned, not material witnesses and the prosecution has no intention to call them to testify. Indeed they were not called at all. Hence, the prosecution is under no duty to produce the statements. It is otherwise if these two witnesses are material and essential for the prosecution to unfold its full narrative and the prosecution had intended to call them but for one reason or another, is unable to do so. In such event, the prosecution is at liberty to produce the said statements provided it satisfies the imperatives under s. 32(1) of the Evidence Act 1950.

[32] It is notable that learned counsel did not request PW6 to produce the statements, did not request the learned DPP for the production of the statements and equally did not apply to the learned judge to compel the prosecution to produce the said statements. We opined that in such circumstances it is now too late in the day to hearken upon the non-production of the statements. In any event, PW6 said that the statements of the two witnesses were taken under s. 113 of the CPC and no statements under s. 112 of the same were taken from them. Verily learned counsel was barking at the wrong tree.

[33] Learned counsel alluded to the following passage from the judgment of the learned judge:

> Di kedua-dua pihak, baik di pihak polis mahupun pihak OKT dan rakan-rakannya, mereka tidak pernah berjumpa dan tidak mengenali di antara satu sama lain. Jadi tidak timbul soal OKT dianiaya dan sebagainya. Apa yang jelas keterangan pembelaan ini lebih merupakan penafian semata-mata. Pembelaan sebegini, tanpa disokong oleh bukti konkrit, bukan pembelaan yang baik.

[34] Based upon the said passage, learned counsel submitted that the learned judge had imposed an unusually higher burden on the appellant to raise a reasonable doubt by expecting the appellant to call his two friends to prove his innocence.

[35] We have scrutinised the judgment of the learned judge in its entirety and with greatest respect we found nothing in the judgment, particularly the passage above, that the learned judge had imposed a higher burden by insisting the appellant to call his two friends to the stand. In our judgment, the learned judge was merely expressing the obvious, that is, the appellant's defence was plainly premised upon mere denial that he was holding the said plastic bag without more, within the *dictum* of the Federal Court cases of *DA Duncan v. PP* [1980] 1 LNS 12 and *PP v. Ling Tee Huah* [1980] 1 LNS 212, alluded to by the learned judge. In the latter case, the court ruled that "… A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient".

[36] We were in full agreement with the said findings of the learned judge.

[37] For all the reasons given, we find no real substance in this appeal to merit our intervention. The appeal against conviction is dismissed and the sentence handed down by the High Court is affirmed.